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Kristi Rae Culver

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Civil RICO: Should Private Plaintiffs Be Granted Equitable Relief?

Few statutes have elicited more controversy than the Racketeer Influenced and Corrupt Organizations Act (RICO).¹ Central to this controversy is the expansion of the scope of the civil RICO provisions.² Apprehension stems in part from a recent explosion of civil RICO actions.³ RICO was enacted to eliminate the infiltration of organized crime into legitimate business,⁴ but is now frequently utilized by private parties to supplement other forms of civil action such as securities and antitrust claims.⁵ This expansive use of the private civil RICO provisions probably was not intended by Congress when RICO was enacted.⁶ One of the issues generated by the RICO controversy has centered around the availability of equitable relief.

The availability of equitable relief is an important question, since, for example, a preliminary injunction may be the only way to prevent

1. RICO was enacted by Congress in 1970. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1982)).

2. See *infra* notes 4-5 and accompanying text.

3. Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3277 n.1 (1985). "Of 270 district RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984." *Id.*

4. Pub. L. No. 91-452, § 1, 84 Stat. 922-23 (1970).

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id.

5. See, e.g., *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982) (residents of retirement community alleged the community was mismanaged); *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983) (action to prohibit group attempting corporate takeover from exercising voting rights); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987 (N.D. Ill. 1984) (RICO claim filed in case regarding misrepresentation before entering a limited partnership agreement devised by defendants); *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807 (W.D. Ky. 1982), *aff'd*, 689 F.2d 94 (6th Cir. 1982) (action to freeze assets of corporation that allegedly conspired to defraud plaintiffs).

6. See *infra* notes 119-80 and accompanying text.

destruction of an existing business by racketeering activities.⁷ Although the Attorney General is authorized to obtain equitable remedies under civil RICO,⁸ the language of section 1964(c) does not clearly indicate whether similar relief is available to private parties.⁹ Civil RICO, 18 U.S.C. § 1964(c), expressly authorizes a private cause of action but provides merely for treble damages and is silent regarding equitable remedies.¹⁰ Section 1964(a) grants broad civil remedies including divestiture, dissolution or reorganization, and permanent injunctions¹¹ for violations of the substantive provisions of 18 U.S.C. § 1962.¹² Section 1962 imposes criminal sanctions for receiving income from racketeering activity.¹³ No specific section of RICO grants to a private plaintiff the right to seek equitable remedies.

At the federal appellate level, only the Ninth Circuit Court of Appeals has expressly declared injunctive relief unavailable to private plaintiffs.¹⁴ No other circuit court has directly addressed this issue. Some circuits, however, have intimated that private equitable relief would not be granted,¹⁵ while others have suggested that such relief would be available.¹⁶

7. See *infra* notes 222-28 and accompanying text.

8. 18 U.S.C. § 1964(b) (1982).

9. Section 1964(c) provides: "Any person injured in his business or property . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit" *Id.* § 1964(c) (1982).

10. The statute provides: "Any person . . . may sue . . . and shall recover threefold the damages" *Id.*

11. *Id.* 1964(a) (1982).

12. *Id.* 1962 (1982).

13. Section 1961 defines racketeering activity as including "[a]ny act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." *Id.* § 1961 (1982). Also included in the definition are various sections from title 18 of the United States Code. *Id.*

14. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1080-89 (9th Cir. 1986) (denying injunction to halt dissemination of allegedly stolen church documents), *cert. denied*, 107 S. Ct. 1336 (1987).

15. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) ("There is substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief . . . [i]n light of the most recent indications from the Supreme Court, *Dan River's* action for equitable relief under RICO might well fail to state a claim"); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983) (citing cases that denied equitable relief and expressing similar doubts regarding the propriety of private injunctive relief).

16. *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir.) (not deciding the issue but citing a law review article indicating equitable relief available to private parties), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1008 (1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 97-98 (6th Cir. 1982) (finding that the district court had the power to issue a preliminary injunction). See also *infra* notes 186-91 and accompanying text.

The district courts that have confronted the equitable relief issue display a similar conflict.¹⁷ One district court has explicitly found that private plaintiffs could obtain equitable relief,¹⁸ while three have expressly declined to grant such relief.¹⁹ Additionally, several district courts have assumed that private civil RICO plaintiffs could obtain equitable relief.²⁰

This comment will explore the controversy surrounding the issue of granting equitable relief to private litigants pursuant to civil RICO. The opinion of the ninth circuit in *Religious Technology Center v. Wollersheim*²¹ will be closely examined.²² The express language of section 1964 will first be scrutinized to determine whether private equitable relief can be found in the language of the statute.²³ Next, the statute will be examined in light of the principles of statutory construction to determine if such a remedy can be implied in a statute not expressly authorizing private equitable relief.²⁴ This comment will then review the legislative history surrounding the enactment of RICO, including the analogies to section 4 of the Clayton Antitrust Act which served as a model²⁵ for the civil RICO statute.²⁶ Finally, the reasoning of the district courts concerning the grant or denial of equitable relief to private plaintiffs,²⁷ as well as the policy consider-

17. See *infra* notes 192-221 and accompanying text.

18. *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1541 (W.D. Pa. 1984) (holding private equitable relief available).

19. *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984) (denying private plaintiffs request for injunction declaring a contractual agreement void); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1382-83 (N.D. Ill. 1984) (denying mandatory injunction ordering the defendants' divestiture); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983) (denying plaintiff's request to block sale of defendant's restaurant).

20. *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807, 814-16 (W.D. Ky. 1982) (granting a preliminary injunction freezing the defendant's assets without discussing whether such relief was available to a private plaintiff), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 420 (S.D.N.Y. 1982) (preliminary injunction denied because plaintiff could not show a likelihood of success on the merits); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1014 (S.D. Tex. 1981) (preliminary injunction denied because plaintiff could not show a likelihood of success on the merits).

21. 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

22. See *infra* text accompanying notes 139-49 & 173-77.

23. See *infra* text accompanying notes 29-73.

24. See *infra* text accompanying notes 74-119.

25. See 116 CONG. REC. 602 (1970) (remarks of Senator Hruska that civil provisions of RICO utilize "time tested antitrust remedies"); *id.* at 35,295 (treble damages provision "another example of the antitrust remedy being adapted for use against organized criminality"); *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3282 (1985) ("the clearest current in [RICO legislative history] is the reliance on the Clayton Act model").

26. See *infra* text accompanying notes 120-80.

27. See *infra* text accompanying notes 181-221.

ations surrounding the issue of private equitable relief will be discussed.²⁸ Initially, the express language of civil RICO must be explored to determine whether the availability of private equitable relief can be inferred from the statutory language.

THE EXPRESS LANGUAGE OF RICO

Civil RICO has been criticized as having been drafted with more "haste than wisdom."²⁹ The express language of the statute is therefore of little assistance in determining whether equitable relief is obtainable by private parties. Nevertheless, the statutory language must still be examined because the plain meaning of the language, absent a clearly expressed legislative intent to the contrary, will control.³⁰

The availability of equitable relief to private plaintiffs is subject to varying statutory interpretations. Section 1964(a) expressly empowers the federal courts to grant formidable equitable remedies, but does not specify who is entitled to this broad relief.³¹ Section 1964(b) grants the Attorney General the power to institute proceedings³² and also provides for the entry of "such restraining orders or prohibitions" as the court deems necessary.³³ Subsection (c) grants "any person" a cause of action for a RICO violation but does not mention private equitable remedies.³⁴ Since section 1964(c) fails to specify whether private equitable relief is available, authorities have concluded that private plaintiffs may not seek equitable remedies.³⁵ Other commentators have urged that the express language of RICO vests

28. See *infra* text accompanying notes 222-38.

29. Bridges, *Private RICO Litigation Based upon "Fraud in the Sale of Securities,"* 18 GA. L. REV. 43, 78-79 (1983). See also *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746 (N.D. Ill. 1981) (section 1964(c) "not a model of legislative draftsmanship").

30. *United States v. Turkette*, 452 U.S. 576, 580 (1981). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.* (quoting *Consumer Prod. Safety Comm'n v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

31. 18 U.S.C. § 1964(a) (1982) provides for equitable remedies:

[i]ncluding but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, . . . prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or reorganization of any enterprise

Id.

32. 18 U.S.C. § 1964(b) (1982).

33. *Id.*

34. *Id.* 1964(c) (1982).

35. *E.g.*, *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1082-84 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987); Bridges, *supra* note 29, at 81.

the courts with authority to grant equitable relief to private parties.³⁶

Congress directed that the provisions of RICO shall be "liberally construed to effectuate its remedial purposes."³⁷ This directive, known as RICO's liberal construction clause, supports the argument that equitable relief is available for private plaintiffs.³⁸ Commentators suggest that this provision reflects the "clear" intention of Congress that any ambiguity in the statute be resolved in favor of the victims of the evil³⁹ Congress sought to eradicate by enacting RICO.⁴⁰ Additionally, the Supreme Court recently directed that RICO be construed liberally "to effectuate its remedial purposes."⁴¹ The remedial purpose of RICO is to halt the infiltration of organized crime into legitimate business.⁴² Because the legislature mandated a liberal construction of the statute, private equitable relief arguably should be inferred from the statutory language.

A. Section 1964(a) as the Basis for Private Equitable Relief

Section 1964(a) of RICO may itself be sufficient to support private equitable relief.⁴³ Subsection (a) provides that "[t]he district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, *including, but not limited to:*"⁴⁴ This language suggests that Congress did not intend to limit the inherent equity powers of the

36. See, e.g., Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1037-38 (1980); Blakey, *RICO Civil Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 330-41 (1982-1983); Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945 (1984).

37. Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). See generally Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980) (interpreting RICO's liberal construction clause directive).

38. Note, *supra* note 37.

39. Congress enacted RICO to combat the "evil" of the infiltration of racketeering activity into legitimate business. Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

40. *Id.* See also Note, *supra* note 36, at 949.

41. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3286 (1985) (quoting Pub. L. No. 91-452, 84 Stat. 947 (1970)). In *Sedima*, the court granted the corporation treble damages under RICO for violations of the Act. This relief was based on predicate acts of mail and wire fraud. The holding of the Court was reached by reading the RICO statute broadly. *Id.*

42. Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

43. See Fricano, *Civil RICO: An Antitrust Plaintiff's Considerations*, 52 ANTITRUST L.J. 361, 375 (1983); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540 (W.D. Pa. 1984). See also *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1083-84 (9th Cir. 1986) (thorough discussion of this theory).

44. 18 U.S.C. § 1964(a) (1982) (emphasis added).

federal courts.⁴⁵ Moreover, section 1964(b) expressly authorizes the Attorney General to "institute proceedings under this section . . ." and grants the court power to "enter such restraining orders or prohibitions, . . . as it shall deem proper." Had Congress intended that the availability of equitable relief under section 1964 was to be determined solely by subsection (b), subsection (a) would be superfluous because both sections provide for equitable relief.⁴⁶

No court has allowed private parties to obtain equitable relief based solely upon the statutory language.⁴⁷ Courts that have granted private equitable remedies have done so on the basis of the inherent equitable powers of the federal courts.⁴⁸ Because Congress must speak clearly to interfere with the historic equitable powers of the courts, the argument for granting equitable relief on this basis is strong.⁴⁹ The Supreme Court has stated, "absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."⁵⁰

The proposition that section 1964(a) of RICO is sufficient to support private equitable remedies was argued by the plaintiff in *Religious Technology Center v. Wollersheim*.⁵¹ In *Wollersheim*, the Church of Scientology brought a civil RICO action seeking an order to enjoin the defendants from allegedly passing copies of stolen Church materials.⁵² The district court granted the Church a preliminary injunction which was reversed by the Court of Appeals for the Ninth Circuit.⁵³ The Church argued that section 1964(a), which provides for equitable remedies, invested the court with power to grant equitable relief to private litigants because the section is general

45. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (federal courts possess inherent equity power).

46. Statutes should not be construed so as to make part of the statute superfluous. *Carleson v. Unemployment Ins. Appeals Bd.*, 64 Cal. App. 3d 145, 155-56, 134 Cal. Rptr. 278, 284 (1976).

47. See *infra* notes 181-221 and accompanying text.

48. *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (granted equitable relief on basis of inherent equitable powers and statutory interpretation of § 1964(a) and (b)); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910 (E.D.N.Y. 1983) (granted injunction because the plaintiff met traditional standards for obtaining a preliminary injunction in the circuit).

49. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (injunctive relief may be awarded in a Social Security proceeding because no clear intent to override federal courts' power to issue injunctions); see also *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Scripps-Howard Radio, Inc., v. F.C.C.*, 316 U.S. 4, 9-11 (1942).

50. *Califano*, 442 U.S. at 705.

51. 796 F.2d 1076, 1083 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

52. *Id.* at 1078-79.

53. *Id.* at 1091.

and apparently unrestricted in application.⁵⁴ The Church also argued that, while the other subsections of 1964 grant specified relief to specific parties, subsection (a) places no limit on the category of litigants who might avail themselves of the remedies available under RICO.⁵⁵ The Church asserted that subsection (b), which grants the Attorney General the right to seek broad equitable remedies, does not restrict injunctive relief to the Attorney General but instead sets aside the traditional equity rule that only a victim can enjoin a crime.⁵⁶ In essence, the Church contended that part (a) was sufficient authority for a federal court to grant an injunction to a private RICO plaintiff even if subsection (c) had never been added to the statute.⁵⁷

The court of appeals in *Wollersheim* rejected these arguments and denied the injunctive relief sought by the plaintiffs stating that equitable relief should not be implied from the statutory language.⁵⁸ The argument that section 1964(a) alone would allow private plaintiffs an equitable remedy might be a reasonable interpretation of the statutory language.⁵⁹ Yet, the *Wollersheim* court noted that congressional intent, as expressed in the legislative history of RICO, must be examined to determine whether such a remedy was intended.⁶⁰

B. Analysis of the Language of Section 1964(c)

Because RICO authorizes a person whose business or property is injured to "sue,"⁶¹ this wording may indicate that all necessary and appropriate relief is available, absent statutory limitations.⁶² In addition, scholars defending a private equitable remedy have found significant the fact that the treble damage provision in section 1964(c)

54. *Id.* at 1083.

55. *Id.*

56. *Id.* at 1083; see *In re Debs*, 158 U.S. 564, 582-84 (1895).

57. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1083-84 (9th Cir. 1986).

58. *Id.* at 1091.

59. *Id.* at 1084.

60. *Id.* See *United States v. Turkette*, 452 U.S. 576, 580 (1981) (must look to the legislative history to determine if there is a strong legislative intent contrary to express language).

61. 18 U.S.C. § 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may sue* therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.* (emphasis added).

62. See *Blakey & Gettings*, *supra* note 36, at 1038 n.133; *Bell v. Hood*, 327 U.S. 678, 684 (1946). "Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.*

is preceded by "and" rather than "to."⁶³ Section 1964(c) in pertinent part provides that "[a]ny person . . . may sue . . . and shall recover threefold the damages he sustains. . . ."⁶⁴ Because the word "and" is used in the statutory language before the treble damages provision, some scholars suggest that all appropriate relief, including the equitable remedies of subsection (a), are available to private plaintiffs, rather than treble damages alone.⁶⁵

Many courts and commentators have rejected the argument that equitable relief is available to private parties merely because the word "and" is used prior to the treble damages provision in section 1964(c) instead of the word "to."⁶⁶ One court found such a reading "bizarre and wholly unconvincing as a matter of plain English and the normal use of language."⁶⁷ More recently, the *Wollersheim* court noted that section 4 of the Clayton Act,⁶⁸ upon which RICO was modeled, contains the same "and" before describing the remedy.⁶⁹ The Clayton Act, although containing similar statutory language, does not extend the remedy provision to encompass private equitable relief.⁷⁰ As the court in *Wollersheim* stated, the fact that the Clayton Act contained the same language as RICO but did not grant private equitable remedies "surely undermines the argument that [the word 'and'] in section 1964(c) indicates . . . injunctive relief is not precluded by that section."⁷¹ Analysis of the language of RICO compels the conclusion that civil RICO does not expressly provide for private equitable

63. See Blakey & Gettings, *supra* note 36, at 1038 n.133; Blakey, *supra* note 36, at 332. But see Kaushal v. State Bank of India, 556 F. Supp. 576, 582 (N.D. Ill. 1983) (discussing Professor Blakey's interpretation of the word "and" in civil RICO and finding it unconvincing); Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1083 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987) (discussing Professor Blakey's interpretation of the word "and" in civil RICO and finding it unconvincing).

64. 18 U.S.C. § 1964(c) (1982) (emphasis added).

65. Blakey & Gettings, *supra* note 36, at 1038 n.133.

66. See, e.g., Kaushal v. State Bank of India, 556 F. Supp. 576, 582 (N.D. Ill. 1983); *Wollersheim*, 796 F.2d at 1083; *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 3275 (1985) ("rather remarkable argument"); Bridges, *supra* note 29, at 76.

67. *Kaushal*, 556 F. Supp. at 582.

68. 15 U.S.C. § 15(a) (1976).

69. *Wollersheim*, 796 F.2d at 1087 n.11. See also *Kaushal*, 556 F. Supp. at 582 (the private antitrust remedy provided in § 4 of the Clayton Act contains the same "and shall recover" language as RICO, and yet Congress had to expressly provide in another section for equitable relief).

70. *Minnesota v. Northern Sec. Co.*, 194 U.S. 48 (1904) (equitable relief was not available to private parties under § 4 of the Clayton Act); see also *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917) (holding private equitable remedies not available under § 4 of the Clayton Act).

71. *Wollersheim*, 796 F.2d at 1087 n.11.

relief.⁷² The principles of statutory construction articulated by the United States Supreme Court, therefore, must be employed to determine if equitable remedies may be inferred from the statutory language.⁷³

PRINCIPLES OF STATUTORY CONSTRUCTION

Although civil RICO provides expressly for some private relief, nothing in the statute expressly grants a private equitable remedy.⁷⁴ In *Cort v. Ash*,⁷⁵ the Supreme Court formulated four factors determinative of whether a private remedy should be implied when the statute does not expressly provide one.⁷⁶ The *Cort* factors are relevant to determine whether a remedy in addition to the provision for treble damages can be inferred from the language of the statute.⁷⁷

A. Availability of a Private Remedy: *Cort v. Ash* Factors

While RICO expressly grants some private relief in section 1964(c), the *Cort v. Ash* factors are still relevant in determining whether additional private remedies should be inferred. Courts have consistently applied the *Cort v. Ash* factors in RICO actions⁷⁸ and in cases involving other statutes that provide some private relief, to determine whether implying further remedies would be consistent with the statutory scheme.⁷⁹ The four factors are: (1) Is the plaintiff one of the class for whose special benefit the statute was enacted?⁸⁰ (2) Is there any indication of legislative intent, explicit or implicit, to create or deny such a remedy?⁸¹ (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the

72. See *supra* notes 29-71 and accompanying text.

73. *Wollersheim*, 796 F.2d at 1087-88.

74. 18 U.S.C. § 1964(c) (1982).

75. 422 U.S. 66 (1975).

76. *Id.* at 78.

77. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) (*Cort* factors relevant in determining whether a private remedy is implicit in § 17(a) of the Securities and Exchange Act of 1934 when such a remedy is not expressly provided for in the statute).

78. *Kaushal v. State Bank of India*, 556 F. Supp. 576, 584 (N.D. Ill. 1983); *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

79. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1 (1981) (applying the *Cort v. Ash* factors to determine whether additional private remedies can be implied in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1266 (1976 & Supp. III 1979), and the Marine Protection, Research, and Sanctuaries Act (MPRSA) 33 U.S.C. §§ 1401-1445 (1976 & Supp. III 1979)).

80. *Cort*, 422 U.S. at 78.

81. *Id.*

plaintiff?⁸² (4) Is the cause of action one traditionally relegated to state law in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?⁸³ A number of Supreme Court cases have applied the *Cort* factors to interpret statutes similar to RICO. In all but one case,⁸⁴ the statutes involved were somewhat different than RICO because no private relief was provided for in the statute. However, because the Supreme Court applied the *Cort v. Ash* factors in one case involving a statute with some express private remedies,⁸⁵ these factors should be looked to for assistance in interpreting statutory language.

*Touche Ross & Co. v. Redington*⁸⁶ involved section 17(a) of the Securities and Exchange Act of 1934. Section 17(a) requires a brokerage firm to file financial reports with authorities from the Securities and Exchange Commission. The customers of a brokerage firm brought suit for damages against the accountants who prepared an audit to be used in connection with the required financial report.⁸⁷ The customers alleged that misstatements were contained in the reports.⁸⁸ Section 17(a)⁸⁹ imposed reporting requirements, but did not provide an express cause of action for individuals injured by a statutory violation.⁹⁰ The Supreme Court in *Touche Ross* emphasized that the *Cort* factors were merely "relevant" factors and not entitled to equal weight when determining whether private remedies should be implied.⁹¹ According to the Court, the "central inquiry" is whether Congress intended to create a private cause of action either expressly or by implication.⁹² The Court concluded that section 17(a) was merely a reporting statute and Congress had not intended to create a private right of action on behalf of brokerage firm customers.⁹³

82. *Id.*

83. *Id.*

84. *Middlesex County Sewerage Ass'n v. National Sea Clammers*, 453 U.S. 1 (1981).

85. *Id.*

86. 442 U.S. 560 (1979).

87. *Id.* at 562.

88. *Id.*

89. 15 U.S.C.A. § 78q(a) (West 1981). Section 17(a) of the 1934 Act requires a registered securities brokerage firm to file an annual report of its financial condition. The report must include a certificate by a public accountant which clearly states the opinion of the accountant regarding the financial statement covered by the certificate. The accountant's statement also must include a comprehensive statement as to the scope of the audit. *Id.*

90. *Touche Ross*, 442 U.S. at 578-79.

91. *Id.* at 575.

92. *Id.*

93. *Id.* at 579.

Similarly, in *Transamerica Mortgage Advisors (TAMA) v. Lewis*,⁹⁴ the Supreme Court held that a private cause of action could not be implied from the Investment Advisors Act of 1940.⁹⁵ In *Transamerica*, a shareholder of Mortgage Trust of America brought suit for damages alleging that trustees had been guilty of fraud and breach of fiduciary duty in violation of the Investment Advisors Act of 1940.⁹⁶ The Court held that section 206 of the Act, which proscribes fraudulent practices of investment advisors, did not create or alter civil liability.⁹⁷ To grant the plaintiff the requested monetary relief, the Court would have been required to read this relief into the act.⁹⁸ The Court declined to do this.⁹⁹ Finally, in *Middlesex County Sewerage Association v. National Sea Clammers*,¹⁰⁰ the Supreme Court was confronted with the question of whether two federal environmental statutes implied a private right of action.¹⁰¹ The Court concluded no private relief was available, because Congress had expressly provided for citizen's suits in other parts of the acts.¹⁰² Additionally, congressional intent to imply other private causes of action was absent.¹⁰³ The issue involved in *Sea Clammers* is directly analogous to implying a private equitable remedy pursuant to civil RICO. In *Sea Clammers*, the environmental statutes had provisions for citizen's suits in other sections of the acts.¹⁰⁴ Similarly, section 1964(c) of RICO provides

94. 444 U.S. 11 (1979).

95. *Id.* at 20-21.

96. *Id.* at 13. The Investment Advisors Act of 1940 was enacted to deal with abuses that Congress had found to exist in the investment advisers industry. 15 U.S.C. § 80b-1 to 80b-19 (1982).

97. *Transamerica*, 444 U.S. at 19. Section 206 of the Investment Advisors Act is codified at 15 U.S.C. § 80b(6).

98. Although monetary relief was sought by the plaintiff in this case, the fundamental principles of statutory construction would be the same when equitable relief is sought. In *Transamerica*, 444 U.S. at 14, the plaintiff sought injunctive relief in the district court and no distinction was made between monetary relief and equitable relief for purposes of statutory construction. *Id.*

99. *Transamerica*, at 19-20. The Court stated: "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.*

100. 453 U.S. 1 (1981).

101. The case concerned the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1266 (1976 & Supp. III 1979), and the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401-1445 (1976 & Supp. III 1979).

102. *Sea Clammers*, 453 U.S. at 14. Private actions are authorized for the FWPCA in 33 U.S.C. § 1365(a) (Supp. III 1979) and for the MPRSA in 33 U.S.C. § 1415(g) (Supp. III 1979).

103. *Sea Clammers*, 453 U.S. at 12. The Court stated: "In the absence of strong indicia of a contrary Congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

104. See *supra* note 102 and accompanying text.

for some private relief but not equitable remedies.¹⁰⁵ The Court in *Sea Clammers* found the fact that Congress had granted private remedies in other sections of the acts persuasive in denying private relief under a section not expressly providing such relief.¹⁰⁶

The *Cort v. Ash* analysis may be inappropriate in civil RICO actions because the above cases¹⁰⁷ are not all on point with respect to civil RICO.¹⁰⁸ *Touche Ross* and *Transamerica* examine the possible existence of a private right of action implied from federal statutes that are silent on the issue.¹⁰⁹ In contrast, Congress expressly established a private right of action for RICO but said little about the remedies which are available for enforcement.¹¹⁰ The distinction between RICO and the statutes at issue in the *Cort v. Ash*¹¹¹ line of cases has led one scholar to recognize that these cases may not control in RICO actions.¹¹²

The distinction between the *Cort v. Ash* line of cases and the RICO statute has not been accepted by courts that have addressed the issue of private equitable relief.¹¹³ Courts have, instead, generally cited and applied *Cort v. Ash* and its progeny¹¹⁴ in holding private equitable relief unavailable under civil RICO.¹¹⁵ In *Wollersheim*, the court, relying on *Sea Clammers*,¹¹⁶ stated that when a statute has an elaborate enforcement scheme conferring on both government officials and citizens authority to sue, the courts cannot assume that Congress intended additional judicial remedies to be implied for private citizens.¹¹⁷ The absence of strong indicia of contrary legislative intent compels the conclusion that Congress provided the appropriate

105. 18 U.S.C. § 1964(c) (1982).

106. 453 U.S. at 14-15.

107. *Cort v. Ash*, 422 U.S. 66 (1975); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors (TAMA) v. Lewis*, 444 U.S. 11 (1979).

108. Wexler, *Civil RICO Comes of Age: Some Maturation Problems and Proposals for Reform*, 35 RUTGERS L. REV. 285, 319 (1983).

109. See *supra* notes 86-99 and accompanying text.

110. 18 U.S.C. § 1964(c) (1982).

111. 422 U.S. 66 (1975).

112. Wexler, *supra* note 108.

113. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088 n.14 (9th Cir. 1986) (applying the *Cort* factors and finding relief unavailable), *cert. denied*, 107 S. Ct. 1336 (1987). See also *Kaushal v. State Bank of India*, 556 F. Supp. 576, 584-85 (N.D. Ill. 1983) (discussing the *Cort* line of cases and finding no "strong indicia" of legislative intent to imply equitable relief in RICO).

114. *Wollersheim*, 796 F.2d at 1088; *Kaushal*, 556 F. Supp. at 584-85.

115. *Wollersheim*, 796 F.2d at 1088; *Kaushal*, 556 F. Supp. at 584-85.

116. 453 U.S. 1 (1981).

117. *Wollersheim*, 796 F.2d at 1088 (citing *Middlesex County Sewerage Ass'n v. National Sea Clammers*, 453 U.S. 1, 14-15 (1981)).

remedies,¹¹⁸ and private equitable relief is not available. Understanding congressional intent in the enactment of RICO requires examination of the legislative history of RICO.¹¹⁹

LEGISLATIVE HISTORY

Review of RICO legislative history demonstrates that Congress never specifically focused on the issue of the availability of private equitable relief.¹²⁰ Nevertheless, the legislative history should be reviewed to determine what Congress was attempting to remedy by enacting an antiracketeering statute. The congressional purpose can be helpful in determining what remedies Congress believed appropriate.

A. *The Birth of RICO*

In 1969 Senators McClellan and Hruska introduced the precursor of RICO, the Corrupt Organizations Act.¹²¹ As introduced, the bill did not expressly grant private remedies,¹²² but provided only criminal sanctions and governmental equitable relief.¹²³ The Senate Committee on the Judiciary incorporated the bill into the Organized Crime Control Act as Title IX.¹²⁴ No private cause of action had yet been added to Title IX.

The provision for a private right of action in RICO originated in the House of Representatives. The House Committee on the Judiciary amended the bill to include private remedies after holding hearings

118. *Id.*

119. *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976) (when the legislative history would aid in construing the language of the statute, it can be examined).

120. *Wexler*, *supra* note 108, at 315. *See also infra* notes 121-53 and accompanying text.

121. S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9566-71 (1969).

122. *Id.*

123. *Id.*

124. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 926-28 (1970) (codified at 18 U.S.C. §§ 6001-6005 (1976)); S. REP. No. 617, 91st Cong., 1st Sess., 83 (1969). The report from the Senate Judiciary called for:

New approaches that [dealt] not only with individuals, but also with the economic base through which those individuals constitute[d] a serious threat to the economic well being of the nation, including a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from *all* illicit activity.

Id. at 76-79 (1969). Senator McClellan's Judiciary Committee report also commented on what is now § 1964, but which at that time contained only subsections (a) and (b). The report noted that § 1964 contained broad remedial provisions for reform. *Id.* "Although certain remedies are set out, the list is not exhaustive, the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." *Id.*

in response to a proposal by the American Bar Association.¹²⁵ During hearings on the bill, Representative Steiger offered an amendment proposing the addition of a private treble damages action modeled on the antitrust laws.¹²⁶ This amendment also explicitly provided a private injunctive remedy.¹²⁷ There was little discussion of the treble damages provision. The legislative history is silent as to precisely why Representative Steiger withdrew the amendment authorizing a private remedy and the subcommittee chose instead to expressly provide for only the private treble damages relief.¹²⁸

Commentators have reached differing conclusions after reviewing the legislative history of RICO. Some scholars have found that the legislative history indicates Congress intended private plaintiffs to receive broad equitable remedies.¹²⁹ Other authors have viewed the same excerpts of history as indicative of legislative intent to preclude such relief.¹³⁰

The legislative history may be interpreted to allow private equitable remedies by inferring that Representative Steiger withdrew his amendment to RICO because the original bill already contemplated private

125. 116 CONG. REC. 35,295 (1970) (statement of Representative Poff). When the amended bill was in the house, Edward L. Wright, President-elect of the American Bar Association, testified before the House on Senate Bill 30 and suggested a treble damages remedy be added to the bill. "In the portion seeking to add a proposed section 1964 'civil remedies' we would recommend an amendment to include the additional civil remedy of authorizing private damage suits based on the concept of § 4 of the Clayton Act." 116 CONG. REC. 25,190-91 (1970). See also Blakey, *supra* note 36, at 275.

126. See 116 CONG. REC. 35,346 (1970).

127. Senator Hruska's original RICO bill, S. 2049, 113 CONG. REC. 17,999 (1967), also provided for private equitable relief. Representative Steiger withdrew his amendment in response to remarks by Representative Poff:

I want to pay special tribute to the gentleman in the well for having raised the issue which his amendment defines. It does offer an *additional* civil remedy which I think properly might be suited to the special mechanism fashioned in Title IX. Indeed, I am an author of an almost identical amendment. It has its counterpart almost *in haec verba* in the antitrust statutes, and yet I suggest to the gentleman that prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have in all the ramifications which this legislation contains and for that reason, I would hope that the gentleman might agree to . . . withdraw his amendments. . . .

116 CONG. REC. 35,346 (1970). The House then passed the bill with the treble damages provision, and the Senate concurred with the House version of the RICO bill. *Id.* at 36,296.

128. See 116 CONG. REC. 25,190-91 (1970). The reason for little discussion regarding the type of relief available under civil RICO is probably because of the late introduction of the bill, after completion of the Senate hearings and after six of eight days of House hearings. Bridges, *supra* note 29, at 54 n.83.

129. Blakey & Gettings, *supra* note 36, at 1038; Blakey, *supra* note 36, at 331-38; Wexler, *supra* note 108, at 315-22.

130. *E.g.*, Bridges, *supra* note 29, at 74-77.

equitable relief and thus made an amendment unnecessary.¹³¹ While this proposition finds some support in the legislative history, the evidence is not conclusive.¹³² When Representative Steiger first introduced his amendment to create a private right of action, he stated that Title IX did not authorize private equitable relief. Later in debate Representative Steiger noted that he felt “presumptuous” for suggesting that private relief was not available under Title IX.¹³³ He added that innocent victims may be able to “obtain proper redress” under the bill without his amendment.¹³⁴ These statements by Representative Steiger do not conclusively demonstrate that he believed the original bill contained equitable remedies.

Another argument in favor of interpreting the legislative history to provide for private equitable relief can be made by reading the treble damages remedy in section 1964(c) as an addition to the equitable remedies provision of section 1964(a).¹³⁵ To some extent, the legislative history does support this theory.¹³⁶ During House debate, Representative Poff, the House sponsor of the original Organized Crime Control Act,¹³⁷ introduced the bill:

Courts are given broad powers under the title [IX] to proceed civilly, using essentially their equitable powers, to reform corrupted organizations, for example by prohibiting the racketeers to participate any longer in the enterprise, [by ordering divestitures and even by ordering dissolution or reorganization of the enterprise].¹³⁸ *In addition*, at the suggestion of [Mr. Steiger] the committee has

131. See, e.g., Blakey, *supra* note 36, at 279 n.121.

132. See Blakey & Gettings, *supra* note 36, at 1097. The authors stated that “even though [Representative Steiger] later withdrew the amendment, he made it clear that he felt the authorization for the private injunctive action existed in the bill and that the amendment was merely to clarify the procedure.” *Id.* However, the language actually used by Representative Steiger in withdrawing his amendment does not evidence that Representative Steiger “clearly” felt authorization for private equitable relief already existed. See Blakey, *supra* note 36, at 279 n.121. Blakey’s interpretations should be given some credence since he was the chief counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970, when the Organized Crime Control Act of 1970 was processed. *Kaushal v. State Bank of India*, 556 F. Supp. 576, 582 n.17 (N.D. Ill. 1983).

133. 116 CONG. REC. 35,346-47 (1970).

134. *Id.* at 35,346.

135. Blakey, *supra* note 36, at 332; Note, *supra* note 36, at 948. *But see* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1085 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

136. See *infra* notes 137-40 and accompanying text.

137. *Wollersheim*, 796 F.2d at 1084 (citing S. 30, 91st Cong. 1st Sess., 115 CONG. REC. 769 (1969)). Senate Bill 30 was the Organized Crime Control Act which was amended to incorporate Senate Bill 1861 as Title IX.

138. Divestitures and dissolutions are expressly provided for in 18 U.S.C. § 1964(a) (1982).

provided that private persons injured by reason of a violation of the title may recover treble damages in federal courts.¹³⁹

Since he stated that treble damages were allowed *in addition* to the equitable remedies of subsection 1964(a), Representative Poff arguably believed private parties could receive the remedies specified in 1964(a).¹⁴⁰ The arguments against private equitable relief based upon the legislative history are, however, equally potent.

Two episodes from the legislative history of civil RICO convinced the *Wollersheim* court that Congress did not intend to grant equitable relief to private parties.¹⁴¹ This finding was based upon the same legislative history as discussed above but the court drew the opposite conclusion. The first episode was the proposed amendment by Representative Steiger.¹⁴² After the withdrawal of the amendment by Representative Steiger, the bill was passed with the treble damages providing what seems to be the sole private remedy.¹⁴³

The second incident occurred after the enactment of RICO. In 1971, Congress rejected a bill to amend section 1964, which would have provided for private equitable relief.¹⁴⁴ The proposed bill was characterized as an expansion of the currently available civil remedies since "[n]ow only the United States can institute injunctive proceedings."¹⁴⁵ Although the amendment was made after RICO was enacted and therefore is postlegislative history and not conclusive, the amendment cannot merely be ignored.¹⁴⁶ The report from the Senate Judiciary on the proposed bill, was favorable.¹⁴⁷ The committee noted that the new bill "authoriz[ed] private injunctive relief from racket-

139. 116 CONG. REC. 35,295 (1970) (emphasis added). See also *Wollersheim*, 796 F.2d at 1085.

140. *Wollersheim*, 796 F.2d at 1085 (quoting 116 CONG. REC. 35,295 (1970)) (stating that the record provides some support for the thesis that the private treble damages remedy is additional to equitable RICO remedies).

141. *Id.* at 1085.

142. See 116 CONG. REC. 35,346 (1970); see also *supra* notes 126-34 and accompanying text.

143. 18 U.S.C. § 1964(c) (1982).

144. S. 16, 92d Cong., 1st Sess. (1971) (during the Senate term following the enactment of RICO, the amendment offered by Representative Steiger, which was later withdrawn, was proposed as a bill to amend § 1964).

145. *Victims of Crime, Hearing before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. of the Judiciary*, 92d Cong., 1st Sess. 3 (1972).

146. *Wollersheim*, 796 F.2d at 1086 n.10. In *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35 (1982), the Supreme Court used the postenactment history of Title IX to assist in determining the intended scope of the title.

147. S. REP. NO. 1070, 92d Cong., 2d Sess. 10 (1972); see also 118 CONG. REC. 29,370 (1972).

eering activity.”¹⁴⁸ The bill was then passed by the Senate but was not approved by the House.¹⁴⁹

An analysis of excerpts from the legislative history of RICO reveals that Congress did not intend equitable relief to be available to private litigants in civil RICO actions. In fact, Congress specifically rejected various amendments and bills that would have expressly granted private plaintiffs the right to injunctive relief.¹⁵⁰

Express statutory language controls interpretation of a statute in the absence of a “strong indicia of contrary legislative intent.”¹⁵¹ Logically, therefore, equitable relief is not available to a private plaintiff since the legislative history does not strongly show congressional intent to the contrary. As expressed in the legislative history,¹⁵² however, civil RICO was modeled after analogous provisions in the antitrust laws. Since the language of section 1964(c) follows section 4 of the Clayton Act¹⁵³ nearly verbatim, an examination of the similarities and differences between the antitrust remedy and civil RICO may be helpful in determining the availability of private equitable relief.

B. Analogies to Antitrust

The legislative history of RICO evinces a strong congressional intent to model civil RICO after the Clayton Act. The antitrust laws served as a model for the civil RICO provisions.¹⁵⁴ When the language of section 15 of the Clayton Act and subsections 1964(a) and (b) of civil RICO are compared, no material difference can be ascertained.¹⁵⁵

148. S. REP. NO. 1070, 92d Cong., 2d Sess. 10 (1972).

149. *Wollersheim*, 796 F.2d at 1086.

150. H.R. 321, 326, 726, 760, 2697, 5215, 9327, 9710 & 10077, 91st Cong., 1st Sess. (1969); S. 2048 & 2049, 90th Cong., 2d Sess. (1968).

151. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

152. See *supra* notes 120-50 and accompanying text.

153. The Clayton Act, 15 U.S.C. § 15 (1976) is an antitrust provision.

154. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1086 (citing 116 CONG. REC. 592 (1970) (remarks of Senator McClellan)); *id.* at 602 (remarks of Sen. Hruska) (civil provisions in RICO employ “time tested antitrust remedies”); S. REP. NO. 617, 80-82, 125, 160 (1969), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007; 116 CONG. REC. 35,295 (1970) (provision for treble damages is “another example of the antitrust remedy being adapted for use against organized criminality”); *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3282 (1985) (“The clearest current in [legislative] history is the reliance on the Clayton Act model . . .”).

155. 15 U.S.C. § 4 (1976) provides:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction

Additionally, the private treble damages remedy embodied in section 1964(c) of civil RICO follows the language of section 4 of the Clayton Act almost verbatim.¹⁵⁶ Nevertheless, the analogy between the Clayton Act and civil RICO is incomplete. Injunctive relief is expressly provided for in section 16 of the Clayton Act,¹⁵⁷ while civil RICO has no analogous provision. Congress added section 16 to the Clayton Act in response to Supreme Court opinions finding private equitable relief unavailable under sections 4 and 15 of the Act.¹⁵⁸ Since Congress knew from prior experience with the Clayton Act¹⁵⁹ that equitable remedies would not be inferred, equitable relief should have been expressly provided for in RICO. Yet in civil RICO the legislature chose language nearly identical to sections 4 and 15 of the Clayton Act, which had been interpreted by the Supreme Court not to encompass equitable relief.¹⁶⁰

Although civil RICO and antitrust provisions are closely analogous, the analogy is not necessarily compelling. Three basic arguments support rejection of the analogy drawn between civil RICO and the antitrust provisions. First, the antitrust laws differ in structure from RICO.¹⁶¹ Next, the legislative history of section 16 of the Clayton Act is different than the history surrounding RICO.¹⁶² Finally, the Clayton Act and civil RICO are substantively dissimilar.¹⁶³

The structure of civil RICO differs from the antitrust provisions. The Clayton Act grants jurisdiction to district courts and gives the

of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Id.

156. Compare 18 U.S.C. § 1964(c) (1982) (RICO) with 15 U.S.C. § 15 (1976) (Clayton Act).

157. 15 U.S.C. § 26 (1976). In pertinent part, § 16 provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief" *Id.*

158. *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (because Congress prescribed a specific equitable remedy that the Attorney General could seek, that is the only equitable remedy Congress intended); see also *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917) (a private citizen cannot maintain a suit for an injunction under § 4 of the Clayton Act).

159. *Minnesota*, 194 U.S. at 70-71; *Paine Lumber Co.*, 244 U.S. at 471.

160. *Minnesota*, 194 U.S. at 70-71; *Paine Lumber Co.*, 244 U.S. at 471.

161. See *infra* notes 164-68 and accompanying text.

162. See *infra* notes 169-72 and accompanying text.

163. See *infra* notes 173-77 and accompanying text.

Attorney General power to institute equity proceedings.¹⁶⁴ Separate sections of the antitrust law provide private parties with treble damages and injunctive remedies.¹⁶⁵ In contrast, RICO has a single subsection granting jurisdiction to the courts to grant equitable relief.¹⁶⁶ That subsection is not expressly limited to injunctive actions brought by the Attorney General.¹⁶⁷ Because of this difference in structure, Congress may have believed that a separate section specifically for private plaintiffs was unnecessary.¹⁶⁸

The comparison between RICO and the antitrust laws has been criticized for overlooking the legislative history of section 16 of the Clayton Act.¹⁶⁹ In *Paine Lumber Co. v. Neal*,¹⁷⁰ the Court held that a private person could not maintain a suit under section 4 of the Clayton Act.¹⁷¹ However, the dissent noted that prior to the enactment of the Clayton Act, the decisions of the lower courts differed regarding the availability of private equitable relief.¹⁷²

In *Church of Scientology v. Wollersheim*¹⁷³ the Church argued that the comparisons between civil RICO and the Clayton Act were inappropriate.¹⁷⁴ The Church reasoned that because the Clayton Act includes a provision expressly limiting the availability of injunctive relief to the government,¹⁷⁵ and RICO contains no such provision, RICO and the Clayton Act are not truly similar.¹⁷⁶ The court in *Wollersheim* refuted this contention by holding that whether or not

164. 15 U.S.C. § 4 (1976).

165. *Id.* §§ 15, 26 (1976).

166. 18 U.S.C. § 1964(a) (1982).

167. *Id.*

168. Wexler, *supra* note 108, at 317.

169. Fricano, *supra* note 43, at 376.

170. 244 U.S. 459 (1917).

171. *Id.* at 464.

172. *Id.* at 474-76 (dissenting opinion). The dissenting justices found it insignificant that an express statement granting private injunctive relief was omitted from the Sherman Act. Instead the dissent found authority for private injunctive relief in article III, § 2 of the United States Constitution which, in effect, adopted equitable remedies in all cases consisting of a federal question. *Id.* at 474-76. Section 2 of Article III extends the judicial power to "[a]ll cases in law and equity, arising under this Constitution, [and] the laws of the United States" *Id.* (citing U.S. CONST. art. III, § 2). See *Bell v. Hood*, 327 U.S. 678 (1946). "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 684. But see *Touche Ross & Co. v. Redington*, 442 U.S. 565 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 13 (1979); *supra* notes 74-119 and accompanying text (demonstrating that current Supreme Court jurisprudence limits implying federal remedies).

173. 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

174. *Id.* at 1087 n.13.

175. 15 U.S.C. § 25 (1976).

176. *Wollersheim*, 796 F.2d at 1087 n.13.

the Clayton Act and RICO are truly similar, Congress believed them to be at the time of the passage of RICO.¹⁷⁷ Congress, therefore, could have added a provision for private equitable relief and clearly chose not to do so.

Congress knew sections 4 and 15 of the Clayton Act had not been interpreted to allow private parties equitable relief.¹⁷⁸ Had Congress intended private RICO plaintiffs to receive equitable remedies, Congress knew from experience¹⁷⁹ that this right would have to be expressly delineated.¹⁸⁰ Since Congress chose not to expressly provide for private equitable relief, this relief should not be implied from the legislative history.

DISTRICT AND CIRCUIT COURTS' OPINIONS

Opinions of the district and circuit courts reflect a disunity of views regarding the availability of private equitable relief under civil RICO.¹⁸¹ Most courts interpreting RICO look to the express language of the statute, the legislative history surrounding the enactment of RICO, and the analogy between civil RICO and the Clayton Act.¹⁸² In contrast, some court opinions employ little analysis in determining whether private equitable relief is available.¹⁸³ Still other courts have simply assumed the availability of equitable remedies.¹⁸⁴ The court

177. *Id.*

178. *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (because Congress prescribed a specific equitable remedy that the Attorney General could seek, that is the only equitable remedy Congress intended); *Paine Lumber v. Neal*, 244 U.S. 459 (1917) (a private citizen cannot maintain a suit for an injunction under § 4 of the Clayton Act).

179. Congress enacted § 16 of the Clayton Act to provide private equitable remedies in part because of the decisions of the Supreme Court in *Northern Sec. Co.*, 194 U.S. 48 (1904) and *Paine Lumber*, 244 U.S. 459 (1917), which denied the existence of an implied private equitable remedy.

180. See *supra* text accompanying notes 158-60.

181. See *infra* notes 185-221 and accompanying text.

182. See, e.g., *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088 (9th Cir. 1986), *cert. denied*, 17 S. Ct. 1336 (1987). *Kaushal v. State Bank of India*, 556 F. Supp. 576, 585 (N.D. Ill. 1983) (both holding private equitable relief unavailable).

183. See, e.g., *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1541 (W.D. Pa. 1984); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 911 (E.D.N.Y. 1983) (both holding private equitable relief available).

184. See, e.g., *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807, 814-15 (W.D. Ky.) (issuing a preliminary injunction freezing defendant's assets), *aff'd*, 689 F.2d 94 (6th Cir. 1982); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 420-22 (S.D.N.Y. 1982) (preliminary injunction denied because plaintiff could not show a likelihood of success on the merits); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1014-15 (S.D. Tex. 1981) (preliminary injunction denied because plaintiff could not show a likelihood of success on the merits).

opinions should be examined in detail to determine which analysis appropriately interprets civil RICO.

A. *The Opinions of the Federal Appellate Courts*

In *Religious Technology Center v. Wollersheim*,¹⁸⁵ the Ninth Circuit Court of Appeals denied the plaintiff's request for a preliminary injunction. The injunction was requested to stop the defendants from disseminating documents allegedly stolen from the Church. While this court is the first federal appellate court to expressly decide whether equitable relief is available to private parties,¹⁸⁶ a few other courts have recognized the issue and reserved judgment on the matter. The fourth circuit in *Dan River, Inc. v. Icahn*,¹⁸⁷ implied that injunctive relief would not be available to a private plaintiff but did not decide the issue.¹⁸⁸ Similarly, in *Trane Co. v. O'Connor*,¹⁸⁹ the second circuit expressed doubts as to the propriety of injunctive relief for private parties.¹⁹⁰ In contrast, the eighth circuit has hinted that injunctive relief may be available under either civil RICO or under the general equitable powers of a court.¹⁹¹ This disunity of views, while primarily dicta, suggests that when the circuit courts do finally decide the issue, there will be a split among the circuits similar to that in the district courts.

B. *The Analysis of the District Courts*

Two district courts have expressly held equitable relief available to private plaintiffs under civil RICO.¹⁹² In *Aetna Casualty & Surety Co. v. Liebowitz*,¹⁹³ the court granted a preliminary injunction to the

185. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 107 S. Ct. 1336 (1987).

186. *Id.* at 1081.

187. 701 F.2d 278 (4th Cir. 1983).

188. *Id.* at 290. The court stated that: "while we do not undertake to resolve the question, [i]n light of the most recent indications from the Supreme Court, *Dan River's* action for equitable relief under RICO might well fail to state a claim." *Id.*

189. 718 F.2d 26 (2d Cir. 1983).

190. *Id.* at 28. "[C]ourts which have confronted the issue have expressed serious doubt concerning the propriety of granting injunctive relief under any circumstances to private parties alleging securities violations under RICO." *Id.*

191. *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (without endorsing the view explicitly, the court cited *Blakey & Gettings*, *supra* note 36, at 1014, 1038 nn.132-33, a law review article which advocates granting private equitable relief).

192. *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 911 (E.D.N.Y. 1983); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1541 (W.D. Pa. 1984).

193. 570 F. Supp. 908 (E.D.N.Y. 1983).

plaintiff after finding that Aetna had met the traditional prerequisites for obtaining a preliminary injunction.¹⁹⁴ The court first looked to the express language of the statute and concluded that only the Attorney General could seek equitable relief.¹⁹⁵ The court then noted that section 1964(a) gives courts broad jurisdiction to remedy RICO violations,¹⁹⁶ "by issuing appropriate orders."¹⁹⁷ The court found that nothing in the statute indicates a preliminary injunction is an inappropriate order.¹⁹⁸ The court in *Aetna* mentioned that Congress turned away earlier versions of RICO containing provisions for private equitable relief.¹⁹⁹ Nonetheless, the court found no clear indication of congressional intent to deprive the district court of "traditional equity jurisdiction" to grant a preliminary injunction.²⁰⁰

The district court in *Chambers Development Co. v. Browning-Ferris Industries*²⁰¹ allowed a private plaintiff to seek equitable relief under section 1964(c). Concluding that private equitable relief was available, the court noted the other district court opinions that had reached contrary results.²⁰² The court, however, found these cases unpersuasive and instead focused upon RICO's liberal construction clause.²⁰³ Additionally, the court found support for its conclusion in the inherent power of a federal court to grant equitable relief.²⁰⁴

Three district courts have assumed the availability of private equitable remedies.²⁰⁵ In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, the district court refused to grant a preliminary injunction under civil RICO because the plaintiffs could not show a substantial likelihood of success on the merits of a RICO cause of action.²⁰⁶ The court did not even mention that private injunctive relief may not be available. Similarly, the court in *Marshall Field & Co. v. Icahn*²⁰⁷ denied a preliminary injunction under RICO because

194. *Id.* at 910.

195. *Id.*

196. *Id.* See 18 U.S.C. § 1962 (1982).

197. *Id.* § 1964(a).

198. *Aetna*, 570 F. Supp. at 910.

199. *Id.* See also *supra* notes 121-50 and accompanying text (legislative history of RICO).

200. *Aetna*, 570 F. Supp. at 910.

201. 590 F. Supp. 1528 (W.D. Pa. 1984).

202. *Id.* at 1540.

203. *Id.*

204. *Id.* at 1540-41.

205. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413 (S.D.N.Y. 1982); *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807 (W.D. Ky. 1982), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982).

206. 518 F. Supp. 993, 1014 (S.D. Tex. 1981).

207. 537 F. Supp. 413 (S.D.N.Y. 1982).

the plaintiffs could not show a substantial likelihood of success on the merits.²⁰⁸ This district court also made no mention of the argument that preliminary injunctive relief may not be available to private plaintiffs. Finally, in *USACO Coal Co. v. Carbomin Energy, Inc.*,²⁰⁹ the court entered a temporary injunction freezing the defendant's assets, without discussing the propriety of private equitable relief under civil RICO.²¹⁰ Presumably, the district courts which assumed the availability of private equitable remedies felt that the federal courts retained their inherent power to grant these remedies and that discussing the propriety of equitable relief in civil RICO actions was unnecessary.

Only three decisions from the district courts interpret civil RICO as denying private equitable relief.²¹¹ Of the three opinions, only *Kaushal v. State Bank of India*²¹² merits extended analysis because the later opinions follow its analysis very closely.²¹³ In *Kaushal*, the court examined the express language of civil RICO to determine if equitable relief was available.²¹⁴ The court reviewed the argument²¹⁵ that "and" before the treble damages clause in civil RICO, instead of "to," meant the treble damages relief was in addition to the equitable remedies of section 1964(a).²¹⁶ The court dismissed this argument as a "bizarre and wholly unconvincing" manipulation of the English language.

Next, the court searched the legislative history to determine the congressional intent in enacting RICO. The court emphasized the withdrawal of Representative Steiger's amendment allowing private injunctive relief as evidence that Congress did not intent to make such relief available to private plaintiffs.²¹⁷ In addition, the court stressed the analogy between the Clayton Act and civil RICO, noting

208. *Id.* at 420 (the court also stated that Field had not demonstrated irreparable harm from the Icahn group's share acquisition).

209. 539 F. Supp. 807 (W.D. Ky. 1982), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982).

210. *Id.* at 814-15.

211. *Kaushal v. State Bank of India*, 556 F. Supp. 576 (N.D. Ill. 1983); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378 (N.D. Ill. 1984); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987 (N.D. Ill. 1984).

212. 556 F. Supp. 576 (N.D. Ill. 1983).

213. In *DeMent*, the court expressly followed Judge Shadur's opinion in *Kaushal*. *DeMent*, 589 F. Supp. at 1381-83. In *Miller*, the court held equitable relief unavailable to private plaintiffs by citing *Kaushal*. *Miller*, 600 F. Supp. at 994.

214. *Kaushal*, 556 F. Supp. at 581.

215. See *supra* notes 63-72 and accompanying text (further discussion of this argument).

216. *Kaushal*, 556 F. Supp. at 582.

217. *Id.* at 583.

that a separate private remedy was later added to the Clayton Act to ensure private plaintiffs injunctive relief.²¹⁸ This apparently convinced the court that Congress understood that a private equitable remedy would have to be expressly delineated to be granted.

Finally, the court applied the canons of statutory construction set forth by the Supreme Court in the *Cort v. Ash*²¹⁹ line of cases. Since the court could not find strong indicia of legislative intent to grant equitable relief, the court determined that a private plaintiff could not recover equitable relief under civil RICO.²²⁰ None of the district or circuit courts discussed the policy considerations underlying the grant or denial of private equitable relief. As the Ninth Circuit Court of Appeals noted in *Wollersheim*, substantial policy issues are pertinent to the decision to grant or deny equitable relief.²²¹

POLICY CONSIDERATIONS

Compelling policy reasons favor granting private equitable relief pursuant to civil RICO. In enacting RICO, Congress intended to curtail and perhaps eliminate the debilitating effect of racketeering activity on American society.²²² There is no doubt that the granting of a private equitable remedy would promote a public-private partnership in the enforcement of RICO.²²³ Although the Attorney General has the express statutory authority to bring an action for equitable relief, the resources of the prosecuting authority are very limited.²²⁴ The Attorney General may not want to bring a civil RICO action solely for equitable relief unless the injunction would halt an activity causing drastic harm to society.²²⁵ By promoting a private-public partnership in enforcing RICO, presumably fewer "racketeers" would be successful in their attempts to destroy legitimate businesses because their unlawful activities could be stopped before any permanent damage is done to the victim's business.²²⁶ Additionally, the victim of illegal racketeering activity has the most incentive to stop

218. *Id.*

219. 422 U.S. 66 (1975).

220. *Kaushal*, 556 F. Supp. at 584.

221. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

222. Note, *supra* note 37, at 167-69 (discussing the liberal construction clause and the purpose for the enactment of RICO).

223. Wexler *supra* note 108, at 321.

224. Wexler, *supra* note 108, at 321.

225. *Id.*

226. *See id.*

the wrongdoing.²²⁷ If private parties can only sue for damages, then a private party victimized by racketeering activity may have difficulty ending the victimization. The injury to the plaintiff's business could continue throughout the trial for treble damages.²²⁸

Important considerations are implicated in the decision to grant private equitable relief. RICO actions can be brought against people who are neither racketeers nor members of organized crime.²²⁹ An allegation of racketeering may have a debilitating effect upon a legitimate business.²³⁰ An alleged RICO violation confronts the defendant with the specter of a quasi-criminal allegation which could stigmatize as racketeers those individuals²³¹ who are typical defendants in security and antitrust litigation.²³² Most recent civil RICO litigation involves corporate defendants and their advisors. The mere pendency of a RICO suit against a defendant creates a stigma which could affect the reputation, business, and personal life of a defendant.²³³

Courts have criticized the growing number of cases which improperly exploit the vague language of the civil provisions of the federal racketeering statute.²³⁴ While the denial of private equitable relief may not decrease the number of civil RICO actions brought, a limitation on civil RICO may discourage potential plaintiffs from arguing to further expand the already broad provisions of civil RICO.²³⁵

Furthermore, the courts are not empowered to determine what Congress should have done, but can only interpret and apply the law the legislature has enacted.²³⁶ Presumably Congress recognized the social benefits that would inure if private equitable relief was allowed. Whether Congress would have been wiser in granting private equitable relief is irrelevant. The relevant inquiry is whether Congress

227. *Id.* at 324-25.

228. *Id.*

229. Note, *Liability for General Business Fraud: Putting a Contract Out on RICO Treble Damages*, 45 U. PITT. L. REV. 481, 493 (1983) (discussing the adverse impact of civil RICO on individuals that were arguably not intended to be covered by RICO's provisions).

230. *Id.*

231. Such as investment advisors, accountants, lawyers, and executives of publicly held corporations.

232. Batista, *The Uses and Misuses of RICO in Civil Litigation: A Guide for Plaintiffs and Defendants*, 8 DEL. J. CORP. L. 181, 182 (1983).

233. *Id.* at 191.

234. See, e.g., *Mauriber v. Shearson/A-Export, Inc.*, 546 F. Supp. 391 (S.D.N.Y. 1982) (criticizes misuse of RICO as an attempt to recoup investment losses).

235. 18 U.S.C. § 1964 (1982).

236. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

intended to grant equitable relief to private parties, not whether this relief should be granted.²³⁷

CONCLUSION

Civil RICO contains no express language granting private equitable relief. The authority to grant permanent equitable relief should not be inferred from the statutory language due to the restrictive view currently held by the Supreme Court regarding implied federal causes of action. In addition, because the legislative history of RICO does not evince a strong intent to include private equitable remedies, these remedies should not be read into the statute.

While the federal courts retain their equitable power to issue injunctions in cases in which they have jurisdiction,²³⁸ section 1964(a) should be limited in application to preliminary injunctions which would preserve the status quo pending litigation on the merits.²³⁹ This grant of equity jurisdiction should not, however, be extended to grant a private right to permanent equitable relief such as divestiture or reorganization of an enterprise.

Kristi Rae Culver

237. *Id.*

238. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

239. *Bridges*, *supra* note 29, at 81.